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ECONOMIC AND ENVIRONMENTAL QUESTIONS: FOLLOW-UP TO GENERAL ASSEMBLY RESOLUTION 50/106: BUSINESS AND DEVELOPMENT

Letter dated 5 November 1996 from the Permanent Representative of the United States of America to the United Nations addressed to the Secretary-General

I have the honour to transmit herewith the text of the 1996 report to the Organization for Economic Cooperation and Development Council at Ministerial level on the Implementation of the Recommendation on Bribery in International Business Transactions (see annex)*.

I would appreciate it if you would have the said text circulated as an official document of the Economic and Social Council under agenda item 6 (i).

(Signed) Madeleine K. ALBRIGHT

* The annex is circulated in the languages of submission only.

ANNEX

Implementation of the Recommendation on Bribery in International Business Transactions

Report of the Committee on International Investment and Multinational Enterprises to the Council at Ministerial level

I. Introduction and Summary of Progress

1. At its meeting in 1995, the OECD Council at Ministerial level invited the OECD to strengthen work on bribery and corruption in international transactions and to provide the 1996 Ministerial meeting with a full progress report on the implementation of the 1994 OECD Recommendation.

2. The 1994 Recommendation on Bribery in International Business Transactions instructs the OECD Committee on International Investment and Multinational Enterprises to monitor implementation and follow-up, and, in particular:

i) to carry out regular reviews of steps taken by Member countries to implement this Recommendation, and to make proposals as appropriate to assist Member countries in its implementation;

ii) to examine specific issues relating to bribery in international business transactions;

iii) to provide a forum for consultations;

iv) to explore the possibility of associating non-Members with this work;

v) in close co-operation with the Committee on Fiscal Affairs, to examine the fiscal treatment of bribery including the issue of tax deductibility of bribes.

3. Since 1994, progress has been made to implement the Recommendation: the OECD examined a wide range of national measures which can apply to international bribery; the Council approved a new recommendation to re-examine tax rules with the intention of disallowing the deductibility of bribes to foreign public officials; analysis of the criminalisation of bribery of foreign public officials resulted in a consensus that it is necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner. These results are reported more fully below.

4. A Symposium on Corruption and Good Governance held in March 1995 stimulated the interest of non-Members in OECD work. Since then, Argentina and Bulgaria have requested to adhere to the OECD Recommendation. To follow-up the Symposium, the OECD also established an informal network to share information on anti-corruption activities among organisations such as the World Bank, the IMF, EBRD, regional development banks, the United Nations, the Council of Europe, the Organisation of American States and others.

5. In other related work, the Development Assistance Committee is presently considering a proposal for adoption by the DAC's High Level Meeting to combat corruption in the securing and implementation of aid-funded contracts (see separate report). The Public Management Service is conducting a comparative analysis of how ethics and conduct are managed in the public service in selected OECD countries. Interest in this issue was underscored by ministers at the March PUMA Ministerial Symposium on the Future of Public Services. Programmes of the Centre for Co-operation with Economies in Transition are assisting countries from central and eastern Europe and the New Independent States to put in place systems which will help them combat corruption.

6. Further progress needs to be made. Over the coming months the OECD will continue to analyse specific issues related to international bribery, including accounting and auditing, the modalities for criminalisation of bribery of foreign public officials, public procurement, commercial and competition law. It will also monitor the progress of Member countries in implementing the 1994 Recommendation and the new recommendation on tax deductibility, and continue its outreach to non-Members and the private sector. These activities will form the basis for the review of the 1994 Recommendation which is to be presented to Ministers in 1997.

II. Progress in Implementing the 1994 Recommendation on Bribery in International Business Transactions

A. Survey of measures to combat bribery in international business transactions

7. The Committee on International Investment and Multinational Enterprises (CIME), through its Working Group on Bribery in International Business Transactions, completed a first examination of measures which could be used to combat bribery in international business transactions [DAFFE/IME/BR(95)9/REV3]. The examination covered participating countries' criminal, civil, and commercial laws, administrative laws, accounting requirements, banking and financial provisions and laws and regulations relating to public subsidies and contracts. Although the information is still partial, it is the most complete survey done to date. It reveals a more positive situation regarding the potential reach of laws to the bribery of foreign public officials than was previously known. In a number of countries existing laws, including criminal laws, may apply, even though they do not specifically address the bribery of foreign public officials.

8. Countries have made some progress in implementing the Recommendation, but further efforts are needed. Most participating countries have established interministerial bodies to review national laws and regulations and many are considering changes in order to extend their laws to reach international bribery. Particular attention is being given to the feasibility of amending criminal law provisions. The ongoing analysis by the Working Group of the various areas of domestic law and regulations and of issues in international co-operation, will permit the Committee to make proposals to assist Member countries in implementing the Recommendation. This analysis will also help set the stage for the review of the Recommendation which will be presented to the meeting of the Council at Ministerial level in 1997.

B. Tax deductibility of bribes

9. In response to the 1994 Recommendation, the Committee on Fiscal Affairs reviewed tax measures which may influence the willingness to make or accept bribes. The Committee summarised the current practices of Member countries, examined the related tax principles and analysed two possibilities to use tax provisions to combat bribery of foreign officials: to disallow the tax deductibility of such bribes or to subject them to disclosure conditions; to use cross-border exchange of tax information to discover and prosecute illegal bribery.

10. In January 1996 the Committee on Fiscal Affairs agreed on a draft recommendation on the tax deductibility of bribes of foreign officials; it was welcomed by the CIME at its meeting on 5 February. The Council approved the recommendation as set forth below at its meeting on 11 April 1996.

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in co-operation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-member countries and to report to the Council as appropriate.

The full text of the Recommendation is attached at annex I.

C. Criminalisation of the bribery of foreign public officials

11. The CIME Working Group on Bribery analysed issues related to the criminalisation of the bribery of foreign public officials at meetings in October 1995 and February 1996. The latter meeting included the participation of prosecutors responsible for anti-corruption cases. The discussions with the prosecutors reinforced the conviction that criminalisation of the bribery of foreign public officials would be a significant means to deter, prevent and combat bribery in international business transactions by providing a basis for criminal prosecution of such acts and by improving the basis in national law for mutual international legal assistance. It would also facilitate the implementation of the recent OECD recommendation on the tax deductibility of bribes.

12. The analysis by the Group of various means to criminalise bribery of foreign public officials showed that a certain latitude can be allowed, consistent with different legal systems. At the same time the Group emphasised that criminalisation should be carried out effectively and co-ordinated in substance. It worked on several methods for criminalisation which could achieve a sound basis for prosecution of such bribery and which are set forth the report DAFFE/IME/BR(96)1/FINAL attached at annex II. Co-ordination should also help to ensure conditions of a "level playing field", with respect to business interests. Action by Member countries to criminalise and to enforce their laws should be subjected to appropriate follow-up and multilateral monitoring.

13. The Working Group and the CIME reached the following conclusions:

1) Member countries agree it is necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner in order to combat corruption in international business transactions;

For that purpose, the CIME through its Working Group on Bribery in International Business Transactions should further examine the modalities and the appropriate international instruments to facilitate criminalisation, taking into account work done in other fora;

Proposals should be submitted as part of the 1997 Review of the 1994 Recommendation;

2) Member countries should review existing procedures to ensure the provision of timely and effective mutual legal assistance in matters relating to allegations of bribery;

3) Member countries should consider including bribery as a predicate offence under their money laundering legislation.

ANNEX I

Recommendation

on the Tax Deductibility of Bribes to Foreign Public Officials

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Co-operation and Development of 14th December 1960;

Having regard to the OECD Council Recommendation on Bribery of Public Officials in International Business Transactions [C(94)75];

Considering that bribery is a widespread phenomenon in international business transactions, including trade and investment, raising serious moral and political concerns and distorting international competitive conditions;

Considering that the Council Recommendation on Bribery called on Member countries to take concrete and meaningful steps to combat bribery in international business transactions, including examining tax measures which may indirectly favour bribery;

On the proposal of the Committee on Fiscal Affairs and the Committee on International Investment and Multinational Enterprises:

I. RECOMMENDS that those Member countries which do not disallow the deductibility of bribes to foreign public officials re-examine such treatment with the intention of denying this deductibility. Such action may be facilitated by the trend to treat bribes to foreign officials as illegal.

II. INSTRUCTS the Committee on Fiscal Affairs, in cooperation with the Committee on International Investment and Multinational Enterprises, to monitor the implementation of this Recommendation, to promote the Recommendation in the context of contacts with non-Member countries and to report to the Council as appropriate.

Annex II

CRIMINALISATION OF BRIBERY OF FOREIGN PUBLIC OFFICIALS

Introduction

1. The 1994 OECD Recommendation on Bribery in International Business Transactions calls upon Member countries to "take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions". It recommends that each Member country examine, inter alia, its criminal laws or their application, in respect of the bribery of foreign public officials, and, in conformity with their jurisdictional and other basic legal principles, take concrete and meaningful steps to meet this goal. It instructs the Committee on International Investment and Multinational Enterprises (CIME) and the Working Group on Bribery in International Business Transactions to examine specific issues relating to bribery in international business transactions, and hence, inter alia, criminalisation of such bribery. The OECD Council meeting at Ministerial level in 1995 invited the OECD to strengthen work on bribery and corruption in international transactions, recognising, inter alia, that an effective approach could be to make such bribery a crime where consistent with national legal regimes.

2. The Working Group had a first discussion of the criminalisation of the bribery of foreign public officials at its meeting on 18-20 October 1995, based on analytical notes prepared, in their personal capacity, by delegates from France, Italy, Norway, Switzerland, the United Kingdom, and the United States. Following this discussion, the Working Group invited the Secretariat to prepare a paper analysing different approaches to criminalisation, including their effectiveness with respect to enforcement and international co-operation. It asked that the analysis also explore means to promote further multilateral action. The paper was considered at a special meeting of the Working Group and prosecutors responsible for anti-corruption cases on 12-13 February and at the regular meeting of the Working Group on 13-14 February. A revised version of the paper was considered by the Working Group at its meeting on 11-12 April.

3. The present revised note takes into account the discussions at the April meeting and is comprised of three parts:

- The first part outlines some of the main issues to consider in analysing different means of criminalising the bribery of foreign public officials;

- The second considers four approaches to criminalisation of bribery of foreign public officials; and looks also at how criminalisation relates to money-laundering and to international legal co-operation;

- The third part sets forth options for co-ordinating a broad multilateral effort to criminalise the bribery of foreign public officials and presents the conclusions of the Group.

I. Main issues to be considered in analysing means of criminalising bribery of foreign public officials

4. Any approach to criminalisation will have to answer a number of fundamental questions concerning the scope of the offence, how jurisdiction is obtained and how enforcement is facilitated.

A. Scope of the offence

Definition of the offence

5. The Recommendation defines bribery as an act that "can involve the direct or indirect offer or provision of any undue pecuniary or other advantage to or for a foreign public official, in violation of the official's legal duties, in order to obtain or retain business". The scope of the Recommendation is, thus, limited to bribery which involves:

-- international business transactions,
-- a foreign public official recipient,
-- violation of the official's legal duties.

6. It is not necessary, in order to be consistent with the Recommendation, that an anti-corruption statute be limited by the elements above. However, at a minimum an act with these elements must be within the scope of the statute.

7. Prosecutors may, in fact, have difficulty in proving some of the elements contained in the OECD Recommendation on bribery, in particular that the payment was not only undue, but also destined to influence a business transaction. It was suggested to use a simpler offence barring the offer/payment to, or the receipt by a public official of an "undue payment".

8. If the law upon which a prosecution of active corruption is based requires that the bribe involve a breach of the official's legal duty, it will be necessary to refer to the law of country of the recipient. This could eventually pose difficulties with respect to ascertaining and interpreting the laws of the foreign countries concerned.

Definition of the offeror

9. If the purpose of criminalisation is to deter the bribery of foreign public officials in international business transactions, it should address the responsible actors. In one sense, these are the agents of the enterprises, but the enterprises themselves can also be considered responsible actors. Though corporate criminal liability is not accepted in the present legal system of many countries, corporations may, nevertheless, be liable to civil and administrative sanctions.

Definition of the recipient

10. The Recommendation does not define the term "public official". A footnote to the Recommendation indicates that "the notion of bribery in some countries also includes advantages to or for members of a law-making body, candidates for a law-making body or public office and officials of political parties"; the intention of the footnote, however, is to identify the "public sector" targets of bribery in some countries, not to define "public official". In fact, the meaning of this term varies from one country to another.

11. If criminalisation is based on a general agency approach (a breach of trust in the relationship between a principal and an agent) it is not necessary to define the recipient. If criminalisation is limited to the scope of the Recommendation, it may require a clear definition of public officials. The discussion of the Working Group identified three ways of defining a public official: an autonomous definition of foreign public official; reference to the definition retained by the country of the foreign recipient; and definition by an international instrument.

12. If a national criminal law refers simply to bribery of a public official, without further definition, this may imply eventual reference to the definition of public official in the law of the recipient. In particular cases difficulties may arise in establishing what that law provides.

13. If the definitions of the laws of the country of the offeror and the recipient diverge there would seem to be several possibilities: to apply the definition of the offeror country; of the recipient country; or the more narrow of the two (*lex mitior*).

B. Jurisdictional basis

14. There are essentially two jurisdictional bases on which bribery of foreign public officials may be prosecuted: territoriality and nationality.

The territorial approach makes the occurrence of an element of the offence in the Member country's territory a condition sine qua non for prosecution.

The nationality approach permits prosecution of nationals or residents who have committed an offence abroad.

15. The effectiveness of territorially-based jurisdiction with respect to its reach to acts of bribery of foreign officials by a country's nationals will be affected by the degree of territorial nexus required to assert jurisdiction. Countries which would assert jurisdiction on the basis of a nexus such as the act of leaving the territory with the intent of committing bribery abroad or of sending a fax from the territory in furtherance of such bribery should be able to pursue a broader range of offences than others which require that more substantial elements of the offence occur within their territory. However, the territorial approach would not reach corruption committed by a country's nationals if it were perpetrated entirely outside the country.

16. Countries with territorially-based jurisdiction may be able to co-operate in a broader range of actions against international bribery by their nationals if they agree either to extradite nationals for prosecution abroad or, failing extradition, to prosecute them as if the acts had occurred on their own territory (*dedere aut judicare*).

17. Dual criminality is often a condition for prosecution based on the nationality approach. The requirement of "simple" or "abstract" dual criminality, i.e., the law of the country where the act occurred also incriminates the bribery of national public officials (or some broader category of agents to which the person in the case belongs) will generally provide an effective basis for enforcement of these statutes where the official is bribed in his own country: most if not all countries criminalise at least the bribery of their own public officials. It would be significantly more difficult to prosecute if dual criminality were interpreted as requiring as the corresponding offence, the bribery of foreign public officials. It is not clear whether dual criminality would be met if the bribery would violate the laws of the country of the recipient but the act occurs in a third country whose criminal law does not reach the conduct.

C. Enforcement/Prosecutorial discretion

18. The role of prosecutorial discretion depends on a country's legal system. In some countries there is little or no discretion if adequate evidence exists. In other countries there is discretion not to prosecute for reasons of public interest, even if evidence is available. Under some legal systems it is possible for a civil party to file suit and thereby require the state to initiate criminal proceedings.

19. The level of prosecutorial effort against bribery also may vary from country to country. This may be related to the amount of resources devoted to anti-corruption work or to the organisation of the effort. Some countries have set up special bodies which integrate a range of investigative expertise in order to reinforce efforts against corruption offences.

II. Criminalisation as a means to combat bribery in international business transactions

20. This section considers four different ways to criminalise the bribery of foreign public officials and also take up the closely related issues of money-laundering and international co-operation.

A. Four ways to criminalise the bribery of foreign public officials

21. The discussion in the Working Group identified essentially four distinct methods for the criminalisation of the bribery of foreign public officials:

1) explicit criminalisation of the bribery of foreign public officials;

2) general anti-corruption and anti-bribery statutes;

3) application or extension of general laws on the bribery of public officials to the bribery of foreign public officials.

4) unfair competition law

1. Explicit criminalisation of the bribery of foreign public officials

22. **Under this approach, a statute defines a specific offence -- the bribery of foreign public officials -- independently of any other existing general anti-corruption or anti-bribery statutes**. The only existing example of this model is the US Foreign Corrupt Practices Act (FCPA).

a) Basis for prosecution

Definition of the offence

23. This model contains a specific definition of the offence, including the element of breach of a recipient official's duty, as well as the motivation for the commitment of the offence, which is its business purpose.

> The US FCPA criminalises the use of the US mails or any means or instrumentality of US interstate and foreign commerce in furtherance of an offer, payment or promise to pay any money or anything of value to foreign government or political party officials, for the purpose of influencing any act or decision of the official or to do or omit to do any act in violation of

his lawful duty in order to assist in the obtaining or retaining business. However, the statute provides for an exception and two affirmative defences:

-- the exception is that it does not apply to any facilitating or expediting payment the purpose of which is to expedite or to secure the performance of a routine governmental action by the foreign public official. The term 'routine governmental action' does not include any decision by a foreign official whether, or on what terms, to award new business to or to continue business with a particular party, or any action taken by a foreign official involved in the decision-making process to encourage a decision to award new business to or continue business with a particular party.

-- the affirmative defences are that the payment was lawful under the written laws of the foreign official's country; or that it was a reasonable and bona fide expenditure, such as travel and lodging expenses.

Definition of the offeror

24. A specific statute may define the offeror to be legal as well as natural persons.

The anti-bribery provisions of the FCPA apply to all "issuers", that is all companies with a class of securities registered with the SEC or required to file reports with the SEC, as well as to all "domestic concerns", defined in the statute as any individual who is a citizen, national or resident of the United States or any corporation, partnership, association which has its principal place of business in the United States.

Definition of the recipient

25. To focus the offence, a specific statute would have as an integral element an autonomous definition of the recipient, the scope of which would depend on the purpose.

Under the FCPA autonomous definition, the recipient could be any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency or instrumentality. The aim of the US law, to deter corruption of public officials in international business, was not deemed to call for reliance on the local definition of "public official" by the victim country's law; this has not presented a problem so far in US prosecutions.

b) Jurisdiction

26. In theory, a specific statute which criminalises bribery of foreign public officials could be combined with any internationally accepted basis of criminal jurisdiction, for this case principally nationality or territoriality.

The FCPA requires a territorial nexus with the US, which could be the use of US mail or other instrumentality of foreign or interstate commerce to further the act. The law also requires that the offeror have a connection to the United States other than mere temporary presence as a visitor, *e.g.*, citizenship, permanent residence, commercial presence, issuer with securities registered in the US or subject to US filing requirements.

c) Enforcement

27. A statute which specifically criminalises the bribery of foreign public officials provides a clear mandate to the criminal justice authorities and allows the setting of remedies which contribute to its deterrent effect. Prosecutorial discretion is still a factor and judgements must be made about the seriousness of the offence (or *e.g.*, in the US case whether exceptions or affirmative defences apply) and likelihood of a successful outcome.

2. General anti-corruption and anti-bribery statute

28. **A general anti-corruption statute provides a broad field of application covering bribery to secure any breach of an agent's duty.** While not directed specifically at bribery of foreign officials in international commerce, it is broad enough to include it, where the person bribed is a government agent.

29. An example of this model is the UK Prevention of Corruption Act, 1906.

a) Basis for prosecution

Definition of the offence

30. Under this model any corrupt act is a criminal offence and the broad definition of the offence encompasses a variety of cases. Both the acts of active and passive bribery are considered and offence; anyone who corruptly accepts or obtains or agrees to accept or attempts to obtain a bribe or who gives or agrees to give or offer a bribe or makes the payment is guilty of an offence.

The UK law applies to any agent, and requires that the conduct sought should be a breach of the agent's duties. This would encompass the full range of the recipient's duties, not just those in relation to obtaining business. The UK law would also catch "deceitful" transactions, i.e., where a bribe is offered by someone who has no intention of ultimately paying it.

Definition of the offeror

31. Under the terms of a general statute, an offeror may be a natural or legal person of any nationality who gives or offers a bribe.

The UK law can prosecute corporations where it can be demonstrated that the actions are perpetrated by the "directing mind" of the company, i.e., its principal directors and managers.

Definition of the recipient

32. A general statute does not expressly define the recipient, since it applies with regard to bribery of any person in relation to his duties as an agent (public or private). Its application does not depend upon and require proof of the legal status of the recipient as a foreign official or person performing a foreign public function.

b) Jurisdiction

33. In principle, a general corruption statute could be applied on either a territorial or a nationality basis, depending on a country's overall approach.

The UK uses a purely territorial basis for its statute and consequently the requirement of dual criminality for prosecution is not needed; the breach of agent's duty need not be criminally punishable under the foreign law governing the relationship of the agent and his principal. The law does not, however, reach bribery of foreign public officials by the country's nationals (natural persons or companies) if no proscribed element of the act takes place in the UK.

c) Enforcement

34. Since this model was not enacted for or traditionally applied to bribery of foreign public officials, some special effort may be required to develop a credible and efficient enforcement against this type of offence and make clear to the business community that such conduct will be prosecuted.

3. Application or extension of general laws on the bribery of public officials to the bribery of foreign public officials

35. **Under this approach, legislation which defines the offence of active bribery of public officials, and which has been traditionally applied only to national officials, would be applied to the bribery of foreign public officials**.

36. Examples of this approach are the Canadian, Hungarian, Greek, New Zealand, Swedish and Turkish laws, which are applicable to such official bribery by any person within their territory and/or by their nationals or residents outside their territory. The Netherlands is considering the introduction of such legislation in the near future.

37. There are two ways that general laws on the bribery of public officials might be made applicable to bribery of foreign public officials. In some countries it might be possible simply to interpret existing laws as applying to foreign public officials. Other countries would have to amend their national criminal statutes by inserting a clause that would extend the scope of current laws against bribing "public officials" to the bribery of "foreign public officials". This approach, however, differs from that of Model 1, in that it avoids the need to write an entire new law; the extended statute would be in harmony with existing concepts such as the definition of the offence or the jurisdictional basis.

a) Basis for prosecution

Definition of the offence

38. The criminal law defines as a general offence the bribery of public officials and the breach of duty as a public official is one of the main elements of the offence. As for the purpose of the bribery act, given that these laws apply initially to cases of bribery of domestic officials and are aimed generally at protecting public integrity, they do not necessarily require a business purpose.

Definition of the recipient

39. This approach raises the problem of the definition of a foreign public official. As indicated above, the Working Group identified three ways to define foreign public official: i) an autonomous definition; ii) reference to the law of the country of the recipient; and definition by an international instrument. Where the scope of the definitions of the country of the offeror and of the recipient differ significantly, some Member countries might wish to include a proviso giving precedence to the more narrow definition (or *lex mitior*).

40. An autonomous definition could be that of the existing national statute or a new definition developed for the purpose of extending the statute, or it could refer to a definition in an international instrument. In view of the differences in definition of public official across countries and the practical difficulties in ascertaining the definition of another state, it may be useful in an autonomous definition to take into account the functions typically undertaken by a state, i.e., a functional definition of a public official as a person performing a function typically undertaken by the state.

b) Jurisdiction

41. This approach could use either the territoriality or nationality basis for jurisdiction. The existing statutes apply both. Under a legal system allowing such a statute to be applied on the basis of nationality, a very wide spectrum of cases could be reached.

c) Enforcement

42. As in the case of the general corruption statute, sufficient priority and resources should be allocated in order to develop effective enforcement against bribery of foreign public officials and to make clear to the business community that such bribery will be prosecuted.

4. Unfair competition law

43. The Working Group also raised the possibility of applying the criminal provisions of unfair competition law to the bribery of foreign public officials. In order to be considered a valid alternative means of criminalising the bribery of foreign public officials, it would need to be as effective as other options. Options could be compared with respect to the main issues discussed above, i.e., the scope of the offence, jurisdictional basis, enforcement and prosecutorial discretion, etc. In particular, a number of conditions would seem necessary in order for an unfair competition law to provide an effective basis for the prosecution of bribery of foreign public officials, inter alia:

- Bribing a foreign public official to obtain or retain business abroad would be presumed to generate a situation of unfair competition. The scope of the law should be the protection of competition in the marketplace and not merely the protection of individual competitors.

- The unfair competition law must provide for protection of competition in foreign markets as well as on domestic markets, and provide protection to all competitors, regardless of nationality.

- The state should have independent responsibility for enforcement of the law, and enforcement should not depend only on private action.

- The unfair competition law should apply adequate sanctions, commensurate with penalties applied by other criminal statutes.

44. The Working Group agreed that, in view of the interest in this option shown by a number of countries, it should be explored further.

B. Money laundering

45. In almost all known cases of corruption of foreign public officials in international business transactions, the bribe money has been laundered abroad, often in countries which maintain strict bank

secrecy. In order to be able to fight corruption efficiently, it may be necessary, as was suggested at the March 1995 Symposium, to make the laundering of proceeds from corruption a criminal offence and to take measures to enforce it. The forty Recommendations of the Financial Action Task Force on Money Laundering (FATF) have recently been expanded to include non-drug predicate offences and they now require the criminalisation of money laundering based on serious offences, with each jurisdiction responsible for determining which serious crimes could be designated as money laundering predicate offences. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime also makes it an offence to launder the proceeds of other offences. However, the FATF and the Council of Europe do not define the serious crimes which should be designated as money laundering offences. Some countries may not classify the bribery of foreign public officials as a serious crime.

46. In general, money laundering has only recently become a criminal offence. Several countries which first considered laundering from the point of view of drug trafficking and terrorism-related offences have gradually expanded the scope of the predicate offence (the offence which generated the laundered proceeds) to cover all serious offences. In most countries, concealing or managing money paid as a bribe to a foreign official would not be covered by money laundering statutes.

47. In order to improve the effectiveness of action against bribery, some countries criminalise the establishment of secret funds (slush funds) which can be used for illegal purposes.

48. If a country adopts a specific statute criminalising the bribery of foreign public officials (Model 1) that statute could either include a provision which stipulates that the laundering of proceeds from the corruption of foreign public officials is punishable or it could refer to a specific money laundering statute.

> The US federal money laundering statute, was amended to include violations of the FCPA as a "specified unlawful activity". With respect to transactions involving the bribery of foreign public officials, the money laundering statute prohibits the knowing conduct or attempted conduct of any financial transaction involving the proceeds of FCPA bribery. Also prohibited is the transportation or attempted transportation of monetary instruments or funds between the United States and places outside the United States i) with the intent to promote the carrying on of FCPA bribery, or ii) knowing that their transportation was designed to conceal or disguise the nature, location, source, ownership or control of the proceeds of the FCPA bribery.

49. Criminalisation of bribery of foreign public officials based on a general anti-corruption statute as in Model 2 might have as a corollary a general prohibition against the laundering of the proceeds of corruption.

> Under the general UK criminal statutes (Criminal Justice Act), it is an offence to launder anywhere in the United Kingdom the proceeds of criminal conduct including corruption, where such conduct constitutes an indictable offence. It does not matter that the conduct generating the proceeds may have taken place outside the United Kingdom, provided that the actual laundering was carried out in the UK.

50. With respect to Model 3, if the bribery of public officials is considered an adequate predicate offence covered by the money laundering legislation, it should remain so when the law is applied to bribery of foreign public officials. Similarly, under Model 4, a bribe violating the criminal provisions of an unfair competition law could be considered a predicate offence under a money laundering statute.

C. International co-operation

51. In order to co-operate in criminal matters at the international level, countries may conclude bilateral or multilateral treaties for transfer of proceedings, mutual legal assistance, and extradition. Countries which have used mutual legal assistance agreements in relation to corruption cases report both legal and administrative problems.

52. The dual criminality requirement can operate as a legal obstacle when it is required in a concrete sense, *i.e.*, the corresponding offence must be bribery of foreign public officials. International legal co-operation would be more effective if the requirement for dual criminality were limited to its simple or abstract sense, i.e., referring only to laws against bribery of public officials. Co-operation could be facilitated even further if dual criminality were not required for mutual legal assistance, but only for cases of extradition.

53. Obstacles of an administrative nature include the length of proceedings. Delays may be due to insufficient resources allocated to co-operation or to the possibility of multiple appeals not only for the person concerned, but also for third persons such as financial institutions (banks, fiduciaries, etc.).

III. Options for a broad multilateral effort to criminalise bribery of foreign public officials; Conclusions

54. In adopting the 1994 Recommendation OECD countries recognised that bribery in international business is widespread, raises serious moral and political concerns, and distorts competition, and that further action is needed on national and international levels to dissuade enterprises and public officials from resorting to bribery. As noted above, in 1995 OECD Ministers suggested that an effective approach could be to make such bribery a crime where consistent with national legal regimes.

55. Over the past year there have been a number of important developments with respect to the criminalisation of international bribery. The Working Group's first examination of Member country measures revealed that in a number of countries existing criminal laws may apply, even though they do not specifically address the bribery of foreign public officials. Several OECD Members have indicated their intention to criminalise such bribery in the near future. The European Union is taking steps to criminalise within the Union, bribery of EU officials and officials of the EU member states. The Council of Europe embarked on the development of several instruments to co-ordinate its Members' efforts to combat international corruption. The Inter-parliamentary Union issued a strong statement requesting governments and parliaments to adapt their legislation in order to punish or extradite residents who corrupt foreign public servants and to make it an offence to launder the proceeds from corruption. The Organisation of American States adopted on 29 March 1996, in Caracas, Venezuela, the Inter-American Convention against Corruption which deals broadly with corruption, national and transnational and, in part, specifically addresses transnational bribery of foreign public officials.

56. The meeting of the Working Group with prosecutors responsible for anti-corruption cases reinforced the conviction that criminalisation of the bribery of foreign public officials would be a significant means to deter, prevent and combat bribery in international business transactions by providing a basis for criminal prosecution of such acts. It would improve the basis in national law for mutual international legal assistance -- another step specified in the Recommendation. It would also facilitate the implementation of the recent OECD Recommendation on the tax deductibility of bribes.

57. The analysis by the Group of various means to criminalise bribery of foreign public officials showed that a certain latitude can be allowed, consistent with different legal systems. At the same time the Group emphasised that criminalisation should be carried out effectively and co-ordinated in substance. It worked on several methods for criminalisation, as set forth above, which could achieve a sound basis for prosecution of such bribery. Co-ordination should also help to ensure conditions of a "level playing field", with respect to business interests. All countries should take together effective measures, within a reasonable timeframe so that no country experiences a prejudice to its business interests because it has acted more expeditiously than others. This implies that countries should move concurrently, not only by introducing criminalisation, but also by effectively enforcing criminal provisions against active bribery of foreign public officials. Action by Member countries to criminalise and to enforce their laws should be subjected to appropriate follow-up and multilateral monitoring.

58. At its meetings in February and April 1996, the Working Group considered three ways to co-ordinate national measures to criminalise the bribery of foreign public officials:

- Recommend to Members to criminalise the bribery of foreign public officials, without further indications, so that Members would apply their jurisdictional and substantive principles in the area.

- Recommend to Members to criminalise the bribery of foreign public officials, with indications on how to proceed (harmonising measures) to avoid excessive divergence in approaches which may inhibit effectiveness;

- Negotiate an international convention, including effective mutual legal co-operation, and defining i.a., the crime and the jurisdictional basis for prosecution.

59. At the meeting of the Working Group on 11, 12 April, there was agreement that criminalisation of the bribery of foreign public officials should be among the arsenal of measures to fight such bribery. A number of delegates considered that a simple recommendation to Members to undertake such criminalisation, which left entirely to national discretion its manner and timing, would not sufficiently guarantee the effectiveness or the equity of the multilateral effort. Some delegates considered that only an international convention could achieve these objectives. Others thought that a recommendation supported by appropriate follow-up and monitoring would be effective.

60. The Working Group reached the following conclusions:

1) Member countries agree it is necessary to criminalise the bribery of foreign public officials in an effective and co-ordinated manner in order to combat corruption in international business transactions;

   For that purpose, the CIME through its Working Group on Bribery in International Business Transactions should further examine the modalities and the appropriate international instruments to facilitate criminalisation, taking into account work done in other fora;

   Proposals should be submitted as part of the 1997 Review of the 1994 Recommendation;

2) Member countries should review existing procedures to ensure the provision of timely and effective mutual legal assistance in matters relating to allegations of bribery;

3) Member countries should consider including bribery as a predicate offence under their money laundering legislation.